



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Alexander Ross v. Canada (Minister of Transport)*, 2019 TATCE 26 (Review)

TATC File No.: O-4386-33

Sector: Aviation

BETWEEN:

Alexander Ross, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Barrie, Ontario, on January 24, 2019

Before: Blaine R. Beaven, Member

Rendered: June 20, 2019

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Alexander Ross, violated subsection 605.84(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$2,500 is reduced to \$1,000.

The total amount of \$1,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On January 5, 2018, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (the Notice) to Alexander Glenn Albert Ross (the applicant), which alleged a contravention of subsection 605.84(1) of the *Canadian Aviation Regulations (CARs)*.

[2] The allegation contained in the Notice is as follows:

On or about May 29, 2017, at or near Mattawa, Ontario (CMA2), you conducted a take-off in a Cessna 172M aircraft, bearing marks C-GNNV, that was in your legal custody and control, when the aircraft did not meet the requirements of a notice that was equivalent to an airworthiness directive that was issued by the competent authority of the foreign state that, at the time the notice was issued, was responsible for the type certificate of the aircraft.

Specifically, the aircraft was not in compliance with [Federal Aviation Administration Airworthiness Directive] FAA AD 93-05-06, ACS and Gerdes Ignition Switches, inspection time limitations specified in the AD, thereby contravening subsection of 605.84(1) of the *Canadian Aviation Regulations*.

[3] The Minister imposed an administrative monetary penalty in the amount of \$2,500.

[4] On February 5, 2018, the applicant requested a review by the Transportation Appeal Tribunal of Canada (Tribunal).

[5] The hearing was held before me on January 24, 2019, in Barrie, Ontario. The Minister's representative called one witness. The applicant represented himself and testified on his own behalf.

II. ANALYSIS

A. Legal framework

[6] Pursuant to subsection 7.7(1) of the *Aeronautics Act (Act)*, the Minister can issue a monetary penalty if they believe on reasonable grounds that a person has contravened a designated provision.

[7] In this case, the designated provision at issue is subsection 605.84(1) of the *Canadian Aviation Regulations (CARs)*, which reads as follows:

605.84 (1) Subject to subsections (3) and (4), no person shall conduct a take-off or permit a take-off to be conducted in an aircraft that is in the legal custody and control of the person, other than an aircraft operated under a special certificate of airworthiness in the owner-maintenance or amateur-built classification, unless the aircraft

(a) is maintained in accordance with any airworthiness limitations applicable to the aircraft type design;

(b) meets the requirements of any airworthiness directive issued under section 521.427; and

(c) except as provided in subsection (2), meets the requirements of any notices that are equivalent to airworthiness directives and that are issued by

- (i) the competent authority of the foreign state that, at the time the notice was issued, is responsible for the type certification of the aircraft, engine, propeller or appliance, or
- (ii) for an aeronautical product in respect of which no type certificate has been issued, the competent authority of the foreign state that manufactured the aeronautical product.

[8] Subsection 7.91(4) of the *Act* provides that the burden of establishing the contravention lies with the Minister. In accordance with subsection 15(5) of the *Transportation Appeal Tribunal of Canada Act*, that burden is on a balance of probabilities.

B. Elements to prove

[9] With respect to this specific case, the following are the elements that must be proven by the Minister on a balance of probabilities:

- a. Date: May 29, 2017;
- b. Place: Mattawa, Ontario (CMA2);
- c. The applicant conducted a take-off in Cessna 172 C-GNNV;
- d. The applicant had legal custody and control of C-GNNV;
- e. AD 93-05-06 was applicable to C-GNNV; and,
- f. AD 93-05-06 was not complied with in regard to C-GNNV.

[10] During the course of the hearing, the Minister's representative filed various exhibits through the Minister's witness Randy Zajac, a Civil Aviation Enforcement Investigator employed by Transport Canada. Mr. Zajac provided evidence as to his role in the investigation and the issuance of the Notice in this case. According to his testimony, Mr. Zajac was provided a Detection Notice and some documents (photographs, log book excerpts, etc.), which he then reviewed. In the course of his investigation, Mr. Zajac decided that a violation of subsection 605.84(1) of the *CARs* had occurred, and he made a recommendation to his regional manager for a Notice of Assessment of Monetary Penalty and a specific monetary penalty to be assessed.

[11] I found Mr. Zajac to be a credible and reliable witness. While he was not a first-hand witness to the events that make up the elements, he was able to explain the use he made of various pieces of evidence provided to him. Many of those pieces of evidence were of assistance in making this determination. Mr. Zajac had considerable experience as an aircraft maintenance engineer (AME), having worked as one from 1987 to 2005 prior to joining Transport Canada.

[12] The applicant testified on his own behalf. He was able to provide first-hand evidence as to the events that occurred, particularly around the annual inspection completed on May 10, 2017. While at times his testimony would stray from evidence into argument, the information he provided was not challenged in cross-examination, and I found him to be credible and reliable.

[13] Both Mr. Zajac and the applicant provided uncontested evidence that established proof of elements (a) to (e) above. I will briefly discuss these elements below, and I will discuss element (f) later in detail.

C. Proof of elements (a) to (c): date and place and that the applicant conducted a take-off

[14] Mr. Zajac provided excerpts of the Journey Log for C-GNNV (Exhibit M-5) with pages specifically from the relevant time periods. The applicant acknowledged that Exhibit M-5 was an accurate copy of the Journey Log. I was later provided the actual Journey Log for viewing and confirmed that Exhibit M-5 was a true copy of it, although I did have to note some clarifications on the exhibit in blue ink, due to the quality (or lack thereof) of the photocopy process. During his testimony, the applicant did not contest that he conducted a take-off in C-GNNV on May 29, 2017, from CMA2 airport. Both the evidence from the Journey Log and the testimony of the applicant with regard to that flight establish, independently of each other, elements (a) to (c).

D. Proof of element (d): that the applicant had legal custody and control of C-GNNV

[15] The applicant confirmed in his testimony that he was the owner of C-GNNV at the time that he flew the aircraft on May 29, 2017. Documents provided by the Minister in Exhibit M-4 (transfer of ownership documents) provided adequate proof of this in any event. Element (d) was proven.

E. Proof of element (e): that AD 93-05-06 was applicable to C-GNNV

[16] Mr. Zajac was able to establish through Exhibit M-2 (photo of Gerdes ignition switch with email dated July 26, 2017) that C-GNNV did have a Gerdes ignition switch. Exhibit M-6, a copy of AD 93-05-06, specified a specific serial number range for applicability to Cessna 172s:

172 17261486 through 17276673

Exhibit M-5 and page 2 of Exhibit M-4 confirmed that the serial number for C-GNNV was 17265092. The applicant acknowledged during his testimony that this AD was applicable to his aircraft and was required to be completed during his annual inspection in May of 2017. Element (e) was proven.

F. Proof of element (f): that AD 93-05-06 was not complied with

[17] This last element requires the most careful consideration, and raises certain issues to be determined:

- a. What effect does the logbook entry of May 10, 2017 have in proving non-compliance with AD 93-05-06?
- b. What is considered **compliance** with AD 93-05-06?

(1) What effect does the logbook entry of May 10, 2017 have in proving non-compliance with AD 93-05-06?

[18] The Minister carries the burden of proving non-compliance with AD 93-05-06 on a balance of probabilities. Given that the Minister cannot have an inspector or investigator observing every maintenance action on every aircraft, in cases such as this one the Minister relies upon documentary evidence.

[19] The Minister's representative relied upon the Journey Log excerpts in Exhibit M-5 as proof that AD 93-05-06 was not complied with. My attention was specifically directed to the entries on Pages B, C, and D.

[20] Pages B and C showed a record of a maintenance action, specifically a 100-hour annual inspection on C-GNNV that was completed on May 10, 2017 (May 2017 entry). Mr. Zajac pointed out that the AME who conducted the inspection recorded "Ad search Carried out", which was explained as a search of applicable ADs being conducted using the database provided by Transport Canada on their website. Mr. Zajac also noted that the following ADs were complied with, as they were recorded as being completed in this logbook entry: AD CF-1981-15R4, AD 2000-06-01, and AD CF-90-03R2.

[21] It was the position of Mr. Zajac, and the Minister's representative, that as AD 93-05-06 was not recorded as being completed in the May 2017 entry, that was sufficient proof that it had not been complied with.

[22] The *CARs* create a regulatory scheme by which persons are permitted to operate aircraft within Canada. The regulations lay out the obligations of those that own, operate, and maintain aircraft, and also the duties of the Minister in regulating aeronautics in Canada.

[23] *CARs* subsection 605.93(1) places a responsibility on the maker of the entry in a journey log to make it accurately. *CARs* Standard 625, Appendix H - Airworthiness Directives provides guidance in regard to section 605.84 of the *CARs*, specifically that persons having legal custody and control of an aircraft must ensure that all ADs are complied with, and where applicable, entries relating to the compliance are made in the aircraft technical records. The May 2017 entry constitutes a maintenance release, and the *CARs* require that it be made accurately.

[24] Section 28 of the *Act* provides that an entry in a journey log is proof of the matters stated therein, absent evidence to the contrary. As section 28 permits that a maintenance release entry in a journey log can be accepted for proof of the contents of that entry, and the *CARs* create a scheme by which it can be presumed that those making maintenance entries accurately record the duties they have performed as required by regulation, the silence of the May 2017 entry with regard to AD 93-05-06 is proof that it was not complied with, absent evidence to the contrary. This establishes proof of element (f), subject to evidence to the contrary.

(2) *What is considered compliance with AD 93-05-06?*

[25] As noted above, the lack of reference to AD 93-05-06 in the May 2017 entry is proof of non-compliance, subject to evidence to the contrary. As the applicant provided evidence to the contrary, I must assess that evidence and determine if it overcomes the presumption in section 28 of the *Act*. If I find that the evidence establishes that AD 93-05-06 was complied with and the May 2017 entry was incomplete, then element (f) would not be proven and the Notice would be dismissed.

[26] The applicant testified that during most of the maintenance work that eventually comprised the May 2017 entry, he was present and was able to observe what the AME he had contracted was doing. He testified that AD 93-05-06 was complied with, and that his AME simply forgot about or overlooked entering it into the Journey Log.

[27] Specifically, the applicant testified that he saw the AME spray LPS 3, a lubricant, into the keyhole of the ignition switch. The applicant points to the fact that in the May 2017 entry, the magnetos on C-GNNV were replaced, as the ones that were already installed had failed a ground run. He testified that in order to test the proper operation of the magnetos, he and/or the AME would have to manipulate the ignition switch by testing the different positions to ensure it was working properly. The applicant described watching the AME do an ignition system check during a ground run while the plane was tied up to a dock. The applicant stated that he also did this check numerous times during the maintenance leading up to the May 2017 entry, and that he does it each time during the run-up before he goes flying in any plane he flies. He provided a screenshot of what he stated was a Cessna 172 checklist for a run-up procedure as Exhibit A-1. I note that it simply says “Mags/Master.....CHECK” without delineating what that “check” specifically requires.

[28] The Minister’s representative submitted that the applicant’s evidence regarding the compliance actions should be afforded little weight. No substantiation for that position was provided, and I note that the applicant was not cross-examined on the accuracy of his recollection. I note that the specifics of what he saw the AME do were only provided when I questioned him as to his assertion that the AD was complied with. Despite the offer being made, the Minister’s representative chose not to re-examine the applicant on this point. This evidence was not something the applicant offered up in his examination-in-chief, which leads me to believe he was not aware of the importance of it. This leads me to accept this evidence.

[29] But does that constitute compliance? In order to determine that, I look to the text of AD 93-05-06, filed as Exhibit M-6. I reproduce the pertinent parts below:

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of ignition switches, accomplish the following:

(a) Within 100 flight hours after the effective date of this AD, or at the next annual inspection, whichever occurs first, perform an inspection of the ignition switch to detect wear and corrosion, and lubricate the switch, in accordance with ACS Service Bulletin SB9201, dated August 15, 1992; or Cessna Service Bulletin SEB91-5, Revision 1, June 14, 1991. If wear or corrosion is detected, prior to further flight, replace the switch in accordance with the service bulletin. Repeat this inspection and lubricate the ignition switch in accordance with the service bulletin, thereafter, at intervals not to exceed 2,000 flight hours.

[...]

(b) Within 100 flight hours after the effective date of this AD, or at the next annual inspection, whichever occurs first, inspect the ignition switch installation to determine if a diode or other surge suppressor is installed on the starter solenoid. If one is not installed, prior to further flight, install a starter solenoid diode in accordance with ACS Service Bulletin SB92-01, dated August 15, 1992; or Cessna Service Bulletin SEB915, Revision 1, dated June 14, 1991.

[...]

(f) This amendment becomes effective on April 29, 1993.

[30] What I distill from this is that in order to comply with AD 93-05-06, an aircraft owner must ensure the following is accomplished:

- a. Within 100 flight hours of April 29, 1993 or at the next annual inspection;
- b. Inspect the ignition switch to detect wear and corrosion;

- c. Lubricate the switch; and,
- d. Inspect the installation to determine if a diode or other surge suppressor is installed on the starter solenoid; if it is not, install one.

[31] Of note, compliance is not listed in the AD as requiring an entry into the Journey Log. However, as noted above, the *CARs* do require a maintenance release to be made regarding the compliance with this AD.

[32] I accept the evidence from the applicant that his AME lubricated the switch and performed a function test. I did not hear evidence from the applicant that any specific inspection to detect wear and corrosion was conducted, nor was I provided with ACS Service Bulletin SB92-01, dated August 15, 1992, or Cessna Service Bulletin SEB91-5, Revision 1, June 14, 1991, as referenced in the AD, to determine what that inspection requires, and whether it was done.

[33] The applicant also did not provide any evidence that he or his AME inspected the installation to determine if a diode or other surge suppressor was installed, and if not, that any actions were taken to rectify that.

[34] The applicant did testify that he reviewed the technical records on C-GNNV and noted that a service bulletin relating to the ignition switch was accomplished in 1985, and that it had flown fewer than 500 hours since then. No further evidence was provided on that point.

[35] Both the applicant and Mr. Zajac testified that they reviewed the Journey Log and the Technical Records and that there were no other entries that matched the service bulletins listed in AD 93-05-06 or any record that it had been completed. The applicant acknowledged that this AD was required to be completed at the annual inspection in May of 2017.

[36] I note that it was open to the applicant to call the AME who signed the May 2017 entry as a witness to provide evidence as to what actions the AME took with regard to AD 93-05-06.

[37] While partial compliance may have occurred in the form of lubrication and function testing, that is not adequate to constitute compliance with AD 93-05-06.

[38] As a result, I find it more likely than not that AD 93-05-06 was not complied with at the time the applicant flew C-GNNV on May 29, 2017, and therefore the presumption under section 28 of the *Act* is not overcome and element (f) has been proven.

G. Due diligence

[39] During the course of his submissions, the applicant raised that he felt he had done his due diligence and that he relied on his AME to conduct the maintenance appropriately. The applicant mentioned multiple times that he was a pilot, “not an AME”, and expressed that the actions of the Minister in this case were unfair as it was his AME who made the mistake, and not him.

[40] When questioned during his submissions, the applicant conceded that he was not only “a pilot” but also an owner and acknowledged that fact placed certain responsibilities upon him.

[41] It is important to consider that while the *CARs* place certain duties upon the owner to ensure that ADs are complied with, the same regulations do not generally permit that owner to conduct or sign an annual inspection unless the aircraft is registered under owner maintenance classification, which C-GNNV was not.

[42] Even if I had found that the AD has been adequately complied with, and the AME simply neglected to note that in the May 2017 entry, that does not absolve the applicant of his duty to ensure that all ADs are complied with and properly recorded as required under the *CARs*.

[43] Section 8.5 of the *Act* provides the statutory authority for the applicant to raise a defence of due diligence, and places upon him the onus of demonstrating—on a balance of probabilities—he exercised all due diligence in the circumstances. The Supreme Court of Canada has stated that in considering such a defence, a decision maker must consider the reasonableness of the actions of the applicant and whether or not all due care has been taken (*R. v. Sault Ste. Marie*, [1978] 2 SCR 1299).

[44] In considering a defence of due diligence, I must consider what a reasonably prudent aircraft owner would do in these circumstances. In my view, such an owner, taking all due care, would research the ADs applicable to their aircraft and ensure that they are complied with. Mr. Zajac testified that Transport Canada provides a website that is available to the public to research ADs that are applicable to specific aircraft and products. Following a maintenance action, they would confirm that the AME did comply with all applicable ADs, and where a deficiency exists would rectify it prior to further flight. Such a reasonably prudent aircraft owner would ensure that maintenance actions that were completed were properly recorded in the technical records.

[45] I find that the applicant has not discharged his onus to prove he took all due care in the circumstances, and the defence of due diligence has not been made out.

H. Sanction

[46] The applicant was sanctioned with a monetary penalty in the amount of \$2,500. The maximum amount for a violation under *CARs* subsection 605.84(1) is \$5,000 for an individual. Mr. Zajac provided evidence as to Transport Canada's practice of how monetary penalties are assessed and indicated that a first violation receives 20 per cent of the maximum (\$1,000), a second violation is at 50 per cent (\$2,500) and a third and subsequent violations are at 100 per cent (\$5,000).

[47] The Minister's representative argued that the sanction is appropriate, and that Transport Canada was acting reasonably in assessing only one violation when there were a series of flights that could have had violations levied.

[48] Mr. Zajac testified that in determining the level of monetary penalty to assess in this case, he believed that the applicant had received a Notice of Violation for a prior violation under the same regulation. His records indicate that prior amount, \$1,000, was paid on August 31, 2017. Despite reviewing material provided to him by the Minister's representative, Mr. Zajac could not provide me with the date that the applicant was provided with that prior Notice of Violation, and specifically if he would have received it before or after May 29, 2017.

[49] The applicant was uncertain of the date that he received the prior Notice of Violation, indicating that he received the Detection Notice in this particular case on July 10, 2017. When questioned further regarding the Notice of Violation for the prior violation, the applicant believed it may have been received around the time the annual inspection on C-GNNV was being completed, or shortly after it was completed. I note the annual inspection was completed on May 10, 2017, and the contravening flight was made on May 29, 2017.

[50] The applicant indicated that upon receiving the Detection Notice regarding this case, he ceased flying C-GNNV, and did not fly it again until he could confirm that all ADs and other maintenance, which had been noted as incomplete by Transport Canada, had been completed. He provided Exhibit A-2, which was a copy of the subsequent page of the Journey Log in Exhibit M-5 showing considerable maintenance completed in July 2018, including the completion of AD 93-05-06.

[51] I find that the concept of “notice” is important; to be put on notice clearly means to be warned or cautioned, with the expectation that the offending behaviour will be curbed. In considering aggravating and mitigating factors, the party that wishes to rely on a specific factor has the burden of proving it. Here, the Minister wishes to rely on the prior violation of the same section.

[52] While I accept there was a prior violation, the evidence presented to me from both the Minister and the applicant on the issue of prior notice is not specific enough to convince me on a balance of probabilities that the applicant had received notice of his prior violation of subsection 605.84(1) of the *CARs* before his actions of May 29, 2017. His actions upon receiving the Detection Notice in July of 2017 are consistent with someone who was not aware of a prior violation.

[53] In these circumstances, I reduce the monetary penalty from \$2,500 to \$1,000, as if the applicant was a first-time violator of subsection 605.84(1) of the *CARs*.

III. DETERMINATION

[54] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Alexander Ross, violated subsection 605.84(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$2,500 is reduced to \$1,000.

[55] The total amount of \$1,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

June 20, 2019

(Original signed)

Blaine R. Beaven

Member

Appearances

For the Minister: Micheline Sabourin

For the Applicant: self-represented